Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah (RISDA) v Gala Permai Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-01(NCVC)(W)-50–01 OF 2018
HAMID SULTAN, ZABARIAH MOHD YUSOF AND YEOH WEE SIAM JJCA
17 MAY 2019

Evidence — Witness — Sole witness — Whether PW1's evidence lacked sufficient probative force for respondent's claim to succeed at trial — Whether PW1 not professionally qualified in the construction industry nor a director or shareholder of respondent or person with locus to move the court to secure a judgment — Whether statements made by PW1 at trial deficient and self-serving such that it was prudent for trial court to accept opposing party's evidence given by professionals in the construction industry — Whether contract between parties gave appellant right to terminate contract for anticipatory breach even though respondent was given extension of time to complete

The appellant appointed the respondent to carry out and complete certain construction works within a span of 12 months. Progress on the works lagged behind schedule necessitating the appellant to give the respondent several warning notices of the delays and to require defects to be remedied. The respondent blamed various factors for the delays including inclement weather, delayed interim payments from the appellant for works done and discussions between the parties over changes to be made to the building design and materials used. When it became apparent to the appellant that the respondent would not be able to complete the works despite the grant of a three month extension to the completion date, it terminated the contract on the ground of anticipatory breach under cl 51.1 of the contract. The respondent sued for unlawful termination saying that it had completed 80% of the works and was capable of completing the contract by the extended completion date. The respondent said it was unreasonable of the appellant to invoke the anticipatory breach clause when cl 43 of the contract entitled the respondent to the full extension of time to complete. The appellant raised a counterclaim for costs it had incurred as a result of the termination including RM1.2m it had to pay a new contractor to complete the works. The High Court allowed the respondent's claim and dismissed the counterclaim resulting in the instant appeal. One of the grounds of appeal was that the respondent had not proven its case because its sole witness, PW1, was not qualified to testify in respect of the dispute in question. The appellant contended that PW1 was not a 'proper person' to verify the respondent's claim because: (a) he was only employed as a project manager and was not a director or shareholder of the respondent;

A (b) PW1 only had a diploma in agriculture and no academic qualification in the construction industry; (c) no letter of appointment or resolution of the respondent was produced authorising PW1 to represent the respondent at the trial; and (d) PW1 admitted during cross-examination that he had calculated the respondent's claim based on the company's report and the quantity B surveyor's report but had not produced any documentary evidence at the trial.

Held, unanimously allowing the appeal, dismissing the respondent's claim and granting judgment for the counterclaim:

C (1) PW1 was the sole witness for the respondent. The probative force of this witness was not dealt with in the trial court's judgment, and that compromised the decision-making process of the trial court warranting appellate intervention. PW1's evidence lacked probative force for the respondent's claim to succeed. He only had a diploma in agriculture and D no qualification with regard to the construction industry. He was only a project manager and not a director or person of locus to move the court to secure a judgment. Many of PW1's statements at the trial were self-serving. In such circumstances, it was prudent of the trial judge to accept the evidence of the appellant's witnesses who consisted of E professionals and/or persons referred to in the contract. The appellant's case was supported by contractual certificates. PW1's evidence in law could not sustain the respondent's claim or debunk the appellant's counterclaim (paras 13 & 16–17).

F (2) The unique contractual feature of a construction contract was that there would be a middleman between the employer and contractor, who would be an architect or engineer or professional of such standing, to certify work done or not done, etc. If the contractor intended to dispute the employer's case, it had to be supported by professional evidence. It was incumbent upon the contractor to lead evidence through a professional G of that standing to have at least some probative force for the court to deal with the issue. The middleman's certificate was often seen to be conclusive evidence (see para 15).

(3) Clause 43 of the contract did not give the respondent an absolute right to H extension of time or right to the full extension period given. The provisos in cl 43 allowed the appellant to terminate the contract for anticipatory breach. On the other hand, cl 51.1 was worded in such a manner that even if extension of time had been granted under cl 43, the appellant still had the right to terminate on one or more grounds (see paras 4–5).

I (4) Construction jurisprudence and contracts were such that, generally, time was of the essence and provisions for extensions of time might entitle the contractor to an extension. However, despite the extension, the contractor might not be able to complete, in which event case law permitted the contractor to be terminated for various grounds including

anticipatory breach. It all depended on the facts and circumstances of the case whether the grounds had to be stated in the notice of termination or the court had to construe all the facts of the case to determine the issue. It was abhorrent to the notion of justice and fair play to allow a party to rely on technical arguments in relation to the termination only, when the evidence of the dispute was well known to all the parties based, inter alia, on communications, minutes, etc (see para 18).

[Bahasa Malaysia summary

Perayu melantik responden untuk menjalankan dan menyelesaikan kerja pembinaan tertentu dalam tempoh 12 bulan. Kemajuan pada kerja-kerja yang ketinggalan memerlukan perayu untuk memberikan notis peringatan kepada responden mengenai kelewatan dan memerlukan kecacatan untuk diperbaiki. Responden menyalahkan pelbagai faktor untuk penangguhan termasuk cuaca buruk, pembayaran interim tertangguh dari perayu untuk kerja-kerja yang dilakukan dan perbincangan antara pihak-pihak atas perubahan yang dibuat kepada reka bentuk bangunan dan bahan-bahan yang digunakan. Apabila ia menjadi jelas kepada perayu bahawa responden tidak dapat menyelesaikan kerja walaupun pemberian pelanjutan tiga bulan pada tarikh penyempurnaan, ia menamatkan kontrak berdasarkan alasan kemungkiran jangkaan di bawah klausa 51.1 kontrak. Responden menyaman untuk pembatalan yang menyalahi undang-undang mengatakan bahawa ia telah menyelesaikan 80% kerja dan mampu menyelesaikan kontrak dengan tarikh penyelesaian yang dilanjutkan. Responden mengatakan tidak munasabah bagi perayu untuk membangkitkan klausa kemungkiran jangkaan apabila klausa 43 kontrak membenarkan responden dengan lanjutan penuh masa untuk penyelesaian. Perayu menimbulkan tuntutan balas terhadap kos yang telah ditanggung akibat penamatan termasuk RM1.2 juta yang terpaksa membayar kontraktor baru untuk menyelesaikan kerja-kerja. Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas yang mengakibatkan rayuan ini. Salah satu alasan rayuan adalah bahawa responden tidak membuktikan kesnya kerana saksi tunggalnya, PW1, tidak layak untuk memberi keterangan berkenaan dengan perselisihan tersebut. Perayu berpendapat bahawa PW1 bukanlah 'orang yang tepat' untuk mengesahkan tuntutan responden kerana: (a) dia hanya bekerja sebagai pengurus projek dan bukan seorang pengarah atau pemegang saham responden; (b) PW1 hanya mempunyai diploma pertanian dan tiada kelayakan akademik dalam industri pembinaan; (c) tiada surat pelantikan atau resolusi responden yang dihasilkan membenarkan PW1 untuk mewakili responden pada perbicaraan; dan (d) PW1 mengakui semasa pemeriksaan balas bahawa dia telah mengira tuntutan responden berdasarkan laporan syarikat dan laporan juruukur bahan tetapi tidak mengemukakan apa-apa bukti dokumentari di perbicaraan.

Diputuskan, sebulat suara membenarkan rayuan, menolak tuntutan responden dan memberikan penghakiman bagi tuntutan balas:

(1) PW1 adalah saksi tunggal untuk responden. Kekuatan pembuktian saksi ini tidak ditangani dalam penghakiman mahkamah perbicaraan, dan yang menjejaskan proses membuat keputusan mahkamah perbicaraan yang menjamin campur tangan rayuan. Keterangan PW1 tidak mempunyai kekuatan pembuktian untuk tuntutan responden untuk berjaya. Beliau hanya mempunyai diploma pertanian dan tiada kelayakan yang berkaitan dengan industri pembinaan. Beliau hanya pengurus projek dan bukan pengarah atau orang lokus untuk berhujah di mahkamah untuk mendapatkan penghakiman. Banyak kenyataan PW1 dalam perbicaraan tersebut berat sebelah. Dalam keadaan sedemikian, adalah bijak bagi hakim perbicaraan untuk menerima keterangan saksi-saksi perayu yang terdiri daripada para profesional dan/atau orang yang dirujuk dalam kontrak. Kes perayu disokong oleh perakuan kontrak. Keterangan PW1 dalam undang-undang tidak dapat mempertahankan tuntutan responden atau membatalkan tuntutan balas perayu (perenggan 13 & 16–17).

(2) Ciri-ciri unik kontraktual suatu kontrak pembinaan adalah bahawa terdapat seorang perantara antara majikan dan kontraktor, yang akan menjadi seorang arkitek atau jurutera atau profesional daripada kedudukan tersebut, untuk mengesahkan kerja yang dilakukan atau tidak dilakukan, dan sebagainya. Sekiranya kontraktor bercadang untuk mempertikaikan kes majikan, ia perlu disokong oleh keterangan profesional. Adalah menjadi kewajipan kontraktor untuk memimpin keterangan melalui profesional daripada kedudukan tersebut untuk mempunyai sekurang-kurangnya beberapa kekuatan pembuktian untuk mahkamah bagi menangani isu tersebut. Perakuan perantara sering dilihat sebagai keterangan muktamad (lihat perenggan 15).

(3) Klausa 43 kontrak tidak memberikan hak mutlak kepada responden untuk melanjutkan masa atau hak kepada tempoh lanjutan penuh yang diberikan. Proviso dalam klausa 43 membenarkan perayu untuk menamatkan kontrak untuk kemungkiran jangkaan. Sebaliknya, klausa 51.1 dipetik sedemikian rupa sehingga walaupun lanjutan masa telah diberikan di bawah klausa 43, perayu masih mempunyai hak untuk menamatkan atas satu atau lebih alasan (lihat perenggan 4–5).

(4) Perundangan pembinaan dan kontrak adalah, pada amnya, masa adalah inti pati dan peruntukan untuk pelanjutan masa mungkin memberi hak kepada kontraktor untuk pelanjutan. Walau bagaimanapun, walaupun pelanjutan, kontraktor mungkin tidak dapat menyelesaikan, di mana undang-undang kes membenarkan kontraktor ditamatkan untuk pelbagai alasan termasuk kemungkiran jangkaan. Ini semua bergantung kepada fakta dan keadaan kes tersebut sama ada alasan perlu dinyatakan dalam notis penamatan atau mahkamah harus mentakrifkan kesemua fakta kes untuk menentukan isu tersebut. Adalah bertentangan terhadap

pengertian keadilan dan permainan adil untuk membenarkan pihak bergantung kepada hujahan teknikal berhubung dengan penamatan sahaja, apabila keterangan pertikaian tersebut diketahui oleh semua pihak berdasarkan, antara lain, pada komunikasi, minit, dan sebagainya (lihat perenggan 18).]

Notes

For a case on sole witness, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3692.

Cases referred to

Bank Pertanian Malaysia Bhd v MCI Bio Tech Sdn Bhd [2013] 6 MLJ 537; [2013] 9 CLJ 29, CA (refd)

Boss s/o Ramasamy v Penang Port Sdn Bhd & Anor [1996] 5 MLJ 511, HC (refd)

Ch'ng Ghee Weng & Anor v Lee Khoon Eng t/a Prestige Construction [2018] 1 LNS 365, CA (refd)

DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia [2014] 11 MLJ 633; [2015] 2 CLJ 946, HC (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd [2016] MLJU 352; [2016] 1 LNS 649, HC (refd)

Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd [2009] MLJU 1001; [2010] 9 CLJ 225, HC (refd)

Green Prospect Sdn Bhd v King Ong Development Sdn Bhd [2018] 6 MLJ 739; [2018] 1 LNS 903, CA (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)

IJM Corp Bhd v Zamri bin Hj Ibrahim & Anor [2014] 2 MLJ 335; [2014] 7 CLJ 479, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)

KNK Development Sdn Bhd & Ors v Sumbangan Aneka Sdn Bhd [2018] MLJU 1281, CA (refd)

Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd [2014] 11 MLJ 218, HC (refd)

Kesuma Murni Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2016] 1 LNS 1276 (refd)

Kumpulan A Besik Sdn Bhd v Araman Jaya Sdn Bhd [2011] 8 MLJ 77, HC (refd)

Mohd Ali bin Abdul Majid v Manokaran a/l Veraya [2011] MLJU 1129; [2012] 1 CLJ 678, HC (refd)

Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan

Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Pelantar Agresif (M) Sdn Bhd lwn Projek Lebuhraya Usahasama Berhad; Lembaga Lebuhraya Malaysia (Pihak Ketiga) [2014] 1 LNS 79 (refd)
Ranbaxy (M) Sdn Bhd v EI Du Pont Nemours and Co [2012] 4 MLJ 34; [2012] 9 CLJ 79, CA (refd)
Shen Yuan Pai v Dato Wee Hood Teck & Ors [1976] 1 MLJ 16; [1974] 1 LNS 153 (refd)
Sunshine Fleet Sdn Bhd v Jabatan Kerja Raya Malaysia & Anor (GM Healthcare Sdn Bhd & Anor, third parties) [2018] 7 MLJ 530, HC
Taufik bin Basiron & Anor v Lembaga Kemajuan Tanah Persekutuan (FELDA) (Civil Suit No S-22NCVC-3–01 of 2012) (unreported) (refd)
Theresa Toyat & Anor v KHL Sdn Bhd [2015] 5 MLJ 31, CA (refd)
West Faulkner Associates (a firm) v Newham London Borough Council (1994) 42 ConLR 144, CA (refd)
West Faulkner Associates (a firm) v Newham London Borough Council (1992) 31 ConLR 105, QBD (refd)

Appeal from: Suit No 22NCVC-65–11 of 2014 (High Court, Malacca)

Mohd Syahir bin Hashim (Shafik Sallehuddin & Kamal) for the appellant.
Muhammad Faiz Fadzil (Mohd Faizal Abdullah) (Faiz Fadzil & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/defendant (employer) appeals against the decision of the learned High Court judge in allowing the respondent/plaintiff's (contractor) claim in relation to a construction project and also dismissed the counterclaim. Parties have relied on the following cases, namely:

(a) *Green Prospect Sdn Bhd v King Ong Development Sdn Bhd* [2018] 6 MLJ 739; [2018] 1 LNS 903;

(b) *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86;

(c) *Ranbaxy (M) Sdn Bhd v EI Du Pont Nemours and Co* [2012] 4 MLJ 34; [2012] 9 CLJ 79;

(d) *Kesuma Murni Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2016] 1 LNS 1276;

(e) *West Faulkner Associates (a firm) v Newham London Borough Council* (1992) 31 ConLR 105;

(f) *West Faulkner Associates (a firm) v Newham London Borough Council* (1994) 42 ConLR 144;

(g) *Pelantar Agresif (M) Sdn Bhd lwn Projek Lebuhraya Usahasama Berhad;*

Lembaga Lebuhraya Malaysia (Pihak Ketiga) [2014] 1 LNS 79;

(h) *Boss s/o Ramasamy v Penang Port Sdn Bhd & Anor* [1996] 5 MLJ 511;

(i) *Sunshine Fleet Sdn Bhd v Jabatan Kerja Raya Malaysia & Anor (GM Healthcare Sdn Bhd & Anor, third parties)* [2018] 7 MLJ 530;

(j) *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464;

(k) *Theresa Toyat & Anor v KHL Sdn Bhd* [2015] 5 MLJ 31;

(l) *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd* [2016] MLJU 352; [2016] 1 LNS 649;

(m) *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33;

(n) *Kumpulan A Besik Sdn Bhd v Araman Jaya Sdn Bhd* [2011] 8 MLJ 77;

(o) *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627;

(p) *Ch'ng Ghee Weng & Anor v Lee Khoon Eng t/a Prestige Construction* [2018] 1 LNS 365;

(q) *Taufik bin Basiron & Anor v Lembaga Kemajuan Tanah Persekutuan (FELDA)* (Civil Suit No S-22NCVC-3–01 of 2012) (unreported);

(r) *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd* [2009] MLJU 1001; [2010] 9 CLJ 225;

(s) *Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd* [2014] 11 MLJ 218;

(t) *DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia* [2014] 11 MLJ 633; [2015] 2 CLJ 946;

(u) *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157;

(v) *Mohd Ali bin Abdul Majid v Manokaran a/l Veraya* [2011] MLJU 1129; [2012] 1 CLJ 678;

(w) *IJM Corp Bhd v Zamri bin Hj Ibrahim & Anor* [2014] 2 MLJ 335; [2014] 7 CLJ 479; and

(x) *Bank Pertanian Malaysia Bhd v MCI Bio Tech Sdn Bhd* [2013] 6 MLJ 537; [2013] 9 CLJ 29.

[2] In the instant case, the defendant has employed the plaintiff and subsequently terminated them in consequence of delay in completion notwithstanding that the defendant has given extension of time. The reason for termination despite extension given was, inter alia, related to anticipatory

breach. The plaintiff had relied on cl 43 of the contract and the defendant had relied on cl 51.1 for its termination.

[3] It is important to note that the plaintiff sole witness PW1's evidence was in issue at the High Court, in our own words, on the grounds of locus, relevancy, admissibility and probative force to establish or debunk the cll 43 or 51.1 requirements. The learned trial judge, despite its importance, did not deal with it in the grounds of judgment.

Clause 43 reads as follows:

DELAY AND EXTENSION OF TIME

Upon it becoming reasonably apparent that the progress of the Works is delayed, the contractor shall forthwith give written notice to the officer named in appendix as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and calculation of the length of delay. If in the opinion of the said officer named in appendix the completion of the works is likely to be delayed or has been delayed beyond the date for completion stated in appendix or beyond any extended date for completion previously fixed under this clause due to any or more of the following events:

(a) force majeure as provided under cl 57;

(b) exceptionally inclement weather;

(c) suspension of Works under cl 50;

(d) directions given by the SO, consequential upon disputes with neighbouring owners provided the same is not due to any act, negligence or default of the contractor or any sub-contractor, nominated or otherwise;

(e) SO's instructions issued under cl 5 hereof, PROVIDED THAT such instructions are not issued due to any act, negligence, default or breach of this contract by the contractor or any sub-contractor, nominated or otherwise;

(f) the contractor not having received in due time instructions in regard to the nomination of sub-contractors and/or suppliers provided in this contract, necessary instructions, drawings or levels for the execution of the works from the SO due to any negligence or default of the SO PROVIDED THAT the Contractor shall have specifically applied in writing on a date which having regard to the Date for Completion stated in Appendix or to any extension of time then fixed under this clause, was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same;

(g) delay in giving possession of the site as provided under cl 38.4 hereof other than claim in effecting insurance and performance bond;

(h) delay on the part of artists, tradesmen or others engaged by the government in executing work not forming part of this contract;

(i) the contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this contract to secure such goods, materials and/or services as are essential to the proper carrying out of the works; or

(j) delay on the part of the nominated sub-contractors and/or nominated suppliers to perform their works, due to reasons as stated above in sub-cll (a)–(i),

then the officer named in appendix may if he is of the opinion that the extension of time should be granted, so soon as he is able to estimate the length of the delay beyond the date or time aforesaid issue a certificate of delay and extension of time giving a fair reasonable extension of time for completion of the works.

PROVIDED THAT all such delays are not due to any act, negligence, default or breach of contract by the nominated sub-contractor and/or nominated supplier and/or the contractor or any of the servants or agents of such nominated sub-contractor or nominated supplier or the contractor.

PROVIDED ALWAYS that the contractor has taken all reasonable steps to avoid or reduce such delay and shall do all that may reasonably be required to the satisfaction of the SO to proceed with the works.

PROVIDED FURTHER that the contractor shall not be entitled to any extension of time where the instructions or acts of the SO are necessitated by or intended to remedy any default of or 'breach of contract by the contractor'.

[4] It is important to note that cl 43 is not an absolute right to extension or full right to the extension period. In addition, if there is a dispute, it may be necessary for the contractor to lead evidence through a professional architect or engineer, etc. Further, subclause that we have underlined above, which says 'PROVIDED ALWAYS that the Contractor has taken all reasonable steps to avoid or reduce such delay and shall do all that may reasonably be required to the satisfaction of the SO to proceed with the Works', also gives an opportunity to the employer to terminate the contract and it may include the jurisprudence of anticipatory breach.

Clause 51.1 reads as follows:

51.1 Default of Obligations

(a) Events of

In the event the Contractor —

(i) fails to commence works at the Site within two (2) weeks after the Date for Possession;

(ii) suspends or abandons the carrying out of the Works or any part thereof before the Date of Completion;

(iii) fails to proceed regularly and diligently with the performance of this obligations under the Contract;

(iv) fails to execute the Works in accordance with the Contract;

(v) persistently neglects to carry out this obligations under the Contract;

(vi) refuses or persistently neglects to comply with a written notice from the SO in relation to any defective work or equipment, materials or goods which are defective or do not meet the requirements of the Contract;

(vii) fails to comply with the provisions of clause 47; or

(viii) fails to comply with any terms and conditions of this Contract,

then the officer named in Appendix shall be given written notice to the Contractor specifying the default, and requiring the Contractor to remedy such default within fourteen (14) days of the receipt of the default notice or any period determined by the officer named in Appendix.

(b) Termination

If the Contractor fails to remedy the breach within such period, the Officer shall have the right to forthwith terminate this Contract by giving a written notice to that effect.

(c) Consequences of Termination

If this Agreement is terminated under clause 51.1(b) —

(i) the Contractor shall —

(A) forthwith cease all operations of the Works;

(B) carry out any protection works so as to secure the Site, equipment, goods, materials therein against any deterioration, loss or damage and to do all things necessary so as to leave the Site in a clean and tidy condition;

(C) remove its personnel and workmen from the Site;

(D) vacate the Site within the time stipulated by the SO, remove all temporary buildings, plant, tools, equipment, goods and unfixed materials which have not been paid by the Government, as specified by the SO Failing which, the Government may (but without being responsible for any loss or damage) remove and sell any such property belonging to the Contractor, holding the proceeds, less all cost incurred, to the credit of the Contractor;

(E) either —

(aa) terminate all third party contracts entered into by the Contractor for the purposes of this Contract;

(bb) assign to the Government, if so required by the S.O., at no cost or expense to the Government, the benefit of any agreement for the supply of

materials or goods and/or for the execution of any work or services for the purposes of this Contract; or

(cc) allow such third party to enter into a contract with the Government or any person deemed necessary by the Government for the purpose of completing the Works;

PROVIDED THAT the Government shall not be obliged to pay any third party for any materials or goods delivered or any work executed or services for the purposes of this Contract (whether before or after the date of termination) for which the Government has paid but the Contractor has failed to make payment to the third party;

(F) at no cost to the Government, hand over to the Government all plans, designs, specification and other relevant documents relating to the Works;

(G) pay to the Government for any losses and damages as a result of termination of this Contract in the manner provided under clause 55; and

(H) not be released from any of its obligations under the Contract.

(ii) the Government shall —

(A) call upon the Performance Bond or forfeit the Performance Guarantee Sum;

(B) enter and repossess the Site;

(C) be entitled to carry out and complete the Works on its own or employ any other person to carry out and complete the Works; and

(D) be entitled to claim against the Contractor for any losses, costs, expenses and damages suffered as a result of termination of this Contract in the manner provided under clause 55.

(iii) Nothing in clause 51.1 or anything else contained in this Contract shall render the Government in any way liable for payments upon termination.

[5] It must also be noted that cl 51.1 is worded in such a manner that even if there is an extension given under cl 43, the employer still preserves his right to terminate for one or more grounds. The notice to terminate in this case reads as follows:

BAHAGIAN KHIDMAT KEJURUTERAAN

TINGKAT 6, BANGUNAN ANNEXE,

IBU PEJABAT RISDA, KM7 JALAN AMPANG,

KARUNG BERKUNCI 11067,

50990 KUALA LUMPUR.

Bil (21) dlm 17.0/9470.00/M.3.1 (FT.31/2010) Klt 13

Tarikh : 10 April 2013

AR REGISTER

NOTIS PENAMATAN

Gala Permai Sdn Bhd

No 10 Tingkat Bawah Wisma Datuk Ayub,

Jalan Cateliya 5,

Taman Cateliya, Senawang,

70450 Seremban,

Negeri Sembilan Darul Khusus.

Tel: 06-6778329

Fax: 06-6778415

Tuan,

PER: NOTIS PENAMATAN KERJA KONTRAKTOR

No. Kontrak : 7.0 – 09/2011

Tajuk Kontrak : CADANGAN MEMBINA DAN MENYIAPKAN SEBUAH DEWAN KULIAH DAN 4 BILIK KULIAH BERSERTA KEMUDAHAN BERKAITAN DI ATAS LOT 2049, KOLEJ RISDA, MUKIM AYER PA'ABAS, DAERAH ALOR GAJAH, MELAKA

Harga Kontrak : RM 5,148,000.00

Tarikh Milik Tapak : 15 Februari 2012

Tarikh Siap Asal : 14 Februari 2013

Tarikh Siap Baru : 04 Mei 2013

Dengan hormatnya surat kami Bil (32) dlm.17.0/9470.00/M.3.1 (FT.31/2010) Klt 11 bertarikh 04 Februari 2013 mengenai perkara di atas adalah dirujuk.

2. Dukacita diperhatikan bahawa tuan gagal melaksanakan kerja seperti yang dirancang dan kerja tuan dijangka tidak akan dapat disiapkan pada tarikh kerja yang telah ditetapkan iaitu pada 04 Mei 2013. Kegagalan tuan itu masih berulang sesungguhpun tuan telah diberi amaran seperti berikut:

(i) Notis Amaran Kelewatan No 1 bertarikh 22/11/2012

(ii) Notis Amaran Kelewatan No 2 bertarikh 07/12/2012

(iii) Notis Amaran Kelewatan No 3 bertarikh 20/12/2013

(iv) Notis Amaran Kelewatan No 4 bertarikh 04/01/2013

(v) Notis Untuk Tujuan Menamatkan Kerja Kontraktor bertarikh 04/02/2013

3. Sejajar dengan Fasal 51 Syarat-Syarat Kontrak, maka pengambilan kerja tuan adalah dengan ini *DITAMATKAN.*

4. Tuan hendaklah dengan ini dengan serta-merta memberhentikan semua perkerjaan di tempat kerja, memindahkan kakitangan dan pekerja dari Tapak Bina dan menyerahkan pemilikan Tapak Bina ini dengan meninggalkan semua bangunan sementara, logi, perkakas, kelengkapan, barang-barang dan bahan belum pasang di Tapak Bina.

5. Kerja akan disiapkan sejajar dengan Fasal 51.1 (c) Syarat-Syarat Kontrak, dan tuan adalah dikehendaki menanggung segala perbelanjaan berlebihan yang akan timbul akibat dari penamatan pengambilan kerja tuan.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'RISDA EFEKTIF PEKEBUN KECIL PRODUKTIF'

'KOMUNITI BERDAYA DESA BERJAYA'

'BAJA CUKUP HASIL MELONJAK'

t/t

(DATO' WAN MOHAMAD ZUKI BIN HJ MOHAMAD)

Ketua Pengarah

RISDA

sk: i. Timbalan Ketua Pengarah (Pengurusan & Korporat)

ii. Ketua Eksekutif
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iii. Pengarah
Bahagian Khidmat Kejuruteraan

vi. Pengarah
Bahagian Tanam Semula & Perladangan (u.p: Ketua Unit RTBB)

v. Pengarah
Pejabat RISDA Negeri Melaka.

vi. Pusat Khidmat Kontraktor
Aras 5, Blok Menara, Menara Usahawan
No 18, Persiaran Perdana, Presint 2
62652 Putrajaya

A
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Kontraktor di atas berdaftar di dalam kelas B

B
vii. Noris Architect
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E
ix. JHA Resources Sdn. Bhd.
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x. Adam QS Consultancy
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G
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Fax: 03-7727 3503

H
DECLARATION

[6] It must be noted that the plaintiff is seeking a declaration in a case related to breach of contract. Declaration, being a discretionary relief the court must
I be slow in granting it. In essence, the threshold to grant declaration is high and normally it should not be given to a person who from the evidence did not meticulously comply with terms of the contract, more so in relation to time (see *KNK Development Sdn Bhd & Ors v Sumbangan Aneka Sdn Bhd* [2018] MLJU 1281).

[7] The plaintiff's prayers read as follows:

(i) Deklarasi bahawa penamatan Kontrak tersebut oleh Defendan adalah tidak sah, batal dan tiada kuatkuasa;

(ii) Jumlah wang sebanyak RM 2,563,979-53;

(iii) Gantirugi am untuk ditaksirkan;

(iv) Faedah pada kadar 5% setahun ke atas 'jumlah penghakiman dari tarikh Writ Saman sehingga penyelesaian penuh;

(v) Kos; dan

(vi) Lain-lain relif dan/atau perintah yang difikirkan suaimanfaat oleh Mahkamah yang mulia ini.

[8] The defendant's counterclaim read as follows:

25 Oleh yang demikian, Defendan menuntut balas terhadap Plaintif seperti berikut:

(i) Jumlah *Kerugian dan/atau Ganti rugi* melalui 'Sijil Perakuan Kos Penamatan' ('Certificate of Termination Cost') yang akan ditaksirkan;

(ii) *Denda lewat dan/ atau penalti* yang *akan* ditaksirkan;

(iii) *Faedah pada kadar 5% setahun* ke atas jumlah Penghakiman dari tarikh penghakiman sehingga penyelesaian sepenuhnya;

(iv) *Kos*; dan

(v) Lain-lain relief dan/atau Perintah yang difikirkan adil dan suai manfaat oleh Mahkamah yang mulia ini.

[9] The memorandum of appeal of the defendant reads as follows:

(A) NOTIS PENAMATAN BERTARIKH 10.04.2013

1. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta bahawa Perayu telah mengeluarkan Notis Penamatan bertarikh 10.04.2013 yang sah selaras dengan peruntukan Klausa 51.1(a) Kontrak bertarikh 16.08.2012.

2. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta bahawa Perayu telah memperincikan kemungkiran obligasi (*specifying the default*) oleh Responden di dalam Notis Penamatan tersebut selaras dengan peruntukan Klausa 51.1(a) Kontrak bertarikh 16.08.2012.

3. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira isi kandungan Notis Penamatan tersebut yang memperincikan kemungkiran obligasi (*specifying the default*) dengan merujuk kepada Notis Amaran Kelewatan No 1 bertarikh 22.11.2012, Notis Amaran Kelewatan No 2 bertarikh 07.12.2012, Notis

A Amaran Kelewatan No 3 bertarikh 20.12.2012, Notis Amaran Kelewatan No 4 bertarikh 04.01.2013 dan juga Notis Untuk Tujuan Menamatkan Kerja Kontrak bertarikh 04.02.2013.

B 4. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira prinsip di dalam kes *Kesuma Murni Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2016] 1 LNS 1276 di dalam memutuskan samada Notis Penamatan tersebut sah atau tidak selaras dengan peruntukan Klausa 51.1 (a) Kontrak tersebut.

C 5. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden pada bila-bila masa tidak pernah membantah isi kandungan Notis Penamatan tersebut.

(B) PENGAKUAN RESPONDEN/PLAINTIF

D 6. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden telah membuat pengakuan berkenaan kelewatan yang berlaku melalui surat Responden bertarikh 18.04.2013 yang bukan bersifat tanpa prasangka ('without prejudice').

E (C) KEMUNGKIRAN TERHADAP KLAUSA 51.1(a) KONTRAK

7. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden telah memungkiri Klausa 51.1(a)(iii) Kontrak tersebut untuk bertindak secara teratur dan tekun ('regularly and diligently') di dalam melaksanakan obligasinya di bawah Kontrak tersebut.

F

8. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden telah melakukan kemungkiran yang berterusan ('continuous breach') terhadap terma Kontrak tersebut berkenaan peratusan kemajuan kerja yang semakin merosot yang menyebabkan berlakunya kelewatan peratusan kemajuan kerja daripada tahap kemajuan kerja yang sepatutnya.

G

9. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa berlakunya kelewatan kemajuan kerja oleh Responden sepertimana berikut:

H

a) Kelewatan kerja sebanyak 6% berdasarkan Minit Mesyuarat Tapak No 10;

b) Kelewatan kerja sebanyak 8% berdasarkan Minit Mesyuarat Tapak No 11;

I

c) Kelewatan kerja sebanyak 8% berdasarkan Minit Mesyuarat Tapak No 12; dan

d) Kelewatan kerja sebanyak 12% berdasarkan Minit Mesyuarat Tapak No 13.

10. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa laporan kemajuan kerja tersebut dibentangkan sendiri oleh Responden di dalam setiap Mesyuarat Tapak tersebut. A

11. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden telah mengakui berkenaan kelewatan kerja tersebut melalui surat Responden bertarikh 27.11.2012, 18.12.2012, 07.01.2013 dan 17.01.2013. B

12. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden selaku kontraktor bertanggungjawab untuk menyediakan 'shop drawing' berkenaan 'roof construction' berdasarkan Klausa 22.1(a) dan (b) Kontrak tersebut, *Bill of Quantities Bill No 1 —Preliminaries & General Conditions (Shop Drawing), Bill No 3 — Building Works (Roof (i) Roof Structure)* serta keterangan SD-1 dan SD-3. C

13. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta bahawa isu kemerosotan kemajuan kerja dan kelewatan yang berlaku adalah disumbangkan sepenuhnya oleh Responden dan bukannya Perayu. D

14. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa percanggahan terhadap lukisan dan Bill of Quantities berkenaan 'roof structure' dari 'lightweight' kepada 'steel structure' tidak melepaskan tanggungjawab Responden untuk menyediakan dan menyerahkan kepada Perayu berkenaan 'shop drawing steel roof structure' dalam masa yang munasabah dan sepatutnya. E F

15. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa berlaku kelewatan yang tidak munasabah iaitu hampir 6 bulan oleh Responden apabila hanya mengemukakan 'shop drawing' bagi 'roof conduction' kepada Perunding Kejuruteraan Awam iaitu Azamas pada 12.09.2012 walaupun beberapa peringatan telah diberikan di dalam Mesyuarat Tapak. G

16. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa berlaku kegagalan yang berterusan (*continuous breach*) oleh Responden untuk melaksanakan obligasinya secara teratur dan tekun (*regularly and diligently*) berhubung isu 'roof construction' bermula Mesyuarat Tapak No 2 sehinggalah Mesyuarat Tapak No 20 iaitu sehari sebelum Notis Penamatan tersebut dikeluarkan. H

17. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden masih gagal menyiapkan Projek tersebut dalam tempoh yang sepatutnya walaupun lanjutan masa (*extension of time*) penyiapan dan penyerahan Projek telah diberikan terhadap Responden sehingga 04.05.2013. I

18. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan

undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden telah membuat pengakuan bahawa Projek tersebut hanya dapat disiapkan dan diserahkan kepada Perayu pada Jun, 2013 berdasarkan surat Responden bertarikh 18.04.2013.

19. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa Responden telah gagal melaksanakan obligasinya secara teratur dan tekun (*regularly and diligently*) kerana telah membuat pemotongan kekuda bumbung yang salah dan membuat kaedah penyambungan bumbung tanpa menghantar terlebih dahulu kaedah kerja (*method statement*) kepada Perunding Kejuruteraan Awam iaitu Azamas selaras dengan *Section I — Structural Steel and Metal Works (Specification)* Kontrak tersebut.

20. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang apabila gagal mengambil kira prinsip kes berkenaan 'anticipatory breach' di dalam kes *Sunshine Fleet Sdn Bhd v Jabatan Kerja Raya Malaysia & Anor (GM Healthcare Sdn Bhd & Anor, third parties)* [2018] 7 MLJ 530, *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 dan *Theresa Toyat & Anor v KHL Sdn Bhd* [2015] 5 MLJ 31 setelah memutuskan kes ini.

21. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah memutuskan bahawa peratusan kerja setakat 09.04.2013 (sehari sebelum Notis Penamatan tersebut dikeluarkan) adalah 2% berdasarkan pembentangan kemajuan kerja oleh Responden pada Mesyuarat Tapak No 20.

22. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa wujudnya 'anticipatory breach' sepertimana berikut:

(a) Peratusan Kemajuan Kerja setakat Mesyuarat Tapak No 20 pada 09.04.2013 adalah 60% berbanding jadual kerja sebenar iaitu 80% berdasarkan pembentangan oleh COW setelah membuat pemantauan dan penilaian kerja di tapak projek;

(b) Email daripada Perunding Kejuruteraan Awam iaitu Azamas bertarikh 15.04.2013 bahawa terdapat 46 skop kerja yang masih belum bermula dan dijadualkan hanya akan siap dalam tempoh 120 hari;

(c) Laporan JHA Resources selaku Perunding Mekanikal & Elektrikal (M&E) yang mengesahkan kerja-kerja M&E tidak akan dapat disiapkan mengikut tarikh penyiapan Kontrak tersebut;

(d) Ulasan Arkitek iaitu Noris berkenaan baki kerja kontrak hanya akan diselesaikan pada bulan Julai, 2013; dan

(e) Pengakuan Responden ketika Mesyuarat Tapak No. 20 pada 09.04.2013 dan di dalam surat bertarikh 18.04.2013 bahawa bangunan hanya akan disiapkan dan diserahkan kepada Perayu pada Jun, 2013.

(D) TUNTUTAN RESPONDEN/PLAINTIF DAN TUNTUTAN BALAS PERAYU/DEFENDAN

23. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang setelah memutuskan dengan membenarkan tuntutan Responden dan menetapkan kos sebanyak RM30,000.00 yang perlu dibayar oleh Perayu kepada Responden.

24. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana bergantung kepada keterangan SP-1 semata-mata tanpa sebarang pembuktian dokumentasi samada baucer bayaran mahupun resit bayaran di dalam membuktikan tuntutan Responden berjumlah RM2,563,979.53.

25. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana gagal mengambil kira fakta bahawa SP-1 bukanlah pihak yang layak (*proper person*) untuk memberikan ulasan dan keterangan berkenaan kerugian dan tuntutan Responden.

26. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira fakta dan keterangan bahawa kesemua tuntutan Responden berjumlah RM2,563,979.53 telah diambil kira ketika penyediaan Penyata Akaun Muktamad/Sijil Kos Penamatan/'Certificate of Termination Cost' (COTC) bertarikh 29.12.2014.

27. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira kewujudan dan keesahan Penyata Akaun Muktamad/Sijil Kos Penamatan/'Certificate of Termination Cost' (COTC) bertarikh 29.12.2014 yang dikeluarkan berdasarkan Klausa 55 Kontrak tersebut yang mengikat Perayu dan Responden ketika menolak tuntutan balas Perayu berjumlah RM 1,217,912.08.

28. Yang Arif Hakim Yang Bijaksana telah terkhilaf dari sudut fakta dan undang-undang kerana telah gagal mengambil kira keterangan SD-1, SD-2, SD-3 dan SD-4 berhubung Penyata Akaun Muktamad/Sijil Kos Penamatan/'Certificate of Termination Cost' (COTC) bertarikh 29.12.2014 tersebut.

[10] The brief facts of the case and the grounds of decision placed before us in a rudimentary manner is reproduced to save court's time and it reads as follows:

BRIEF FACTS

1. The defendant appointed the plaintiff as the main contractor to construct and complete a project.

2. The contract period was 12 months from 15 February 2012 and the plaintiff was to complete the project works on or before 14 February 2013.

3. Whilst the plaintiff was carrying out the project works, the defendant complained of delay and issued several Notis Amaran Kelewatan.

4. The defendant's complaint was that there was persistent delay in the plaintiff carrying out the works diligently, particularly in respect of the construction of the roof trusses, the works for which were yet to start.

5. The plaintiff on the other hand refuted the allegation of delay on their part or a failure on their part to carry out the works continuously and diligently. The plaintiff alleged that the delay in the works were occasioned by factors beyond their control or doing:

(a) inclement weather had contributed to the delay;

(b) the defendant persistently delayed interim payments for works done which had adversely affected the plaintiff's cash flow and had thus disrupted payment to suppliers of material at site and wages to workers;

(c) the defendant had instructed structural changes to the design and material which contributed to the delay;

(d) the plaintiff was asked to change the design and material for the roof trusses as it was found to be structurally unsuitable;

(e) the change in material and design to the roof trusses took some time to be finalised; and

(f) the plaintiff was also instructed to carry out variation works which further affected the progress of works.

6. As a result of these difficulties and challenges, the plaintiff had in accordance to the terms of the contract applied vide letter dated 5 December 2012 for an extension of time to complete the works which was granted by the defendant vide letter 4 March 2013.

7. However, shortly after, the defendant terminated the plaintiff's employment as contractor by relying on the provisions of cl 51.1 of the conditions of contract.

THE PLAINTIFF'S CASE

8. The plaintiff pleads that the termination of contract under cl 51.1 is unlawful for it had not breached any of the terms of the conditions of contract.

9. The plaintiff states that it had regularly and diligently proceeded with the contract works and that the delay in the progress of works was not occasioned by the plaintiff's default but was instead caused by the defendant.

10. The termination of the contract is premature and unlawful as the plaintiff had given an extension till 4 May 2013 to complete the works.

11. To say that the plaintiff would be unable to complete the works on time is highly speculative and unreasonable.

12. At the date of the termination it had completed 80% of the works and was confident of completing the works on or before 4 May 2013 ie the extended completion date.

THE DEFENDANT'S CASE

13. The defendant states the termination was in accordance to cl 51.1 as the plaintiff had persistently delayed in carrying out works.

14. The defendant stated that it had issued several *Notis Amaran Kelewatan* in respect of the delay in works and the plaintiff had not remedied the alleged default and this led to the issuance of the notice of termination.

15. The termination was occasioned by the plaintiff's default in not proceeding with the works regularly and diligently and is thus in accordance to the provisions of cl 51.1 of the conditions of contract.

16. The defendant states that as a result of the plaintiff's default and termination of the contract, the defendant had incurred losses and expense and counterclaims against the plaintiff for these losses.

17. The defendant claims that in accordance to cll 55.1–55.6 of the conditions of contract, the superintending officer had following the termination of contract, issued a certificate of termination costs dated 29 December 2014 in which the SO had certified that the additional cost incurred by the defendant in engaging a new contractor to complete the works is RM1,217,912.08 which the defendant claims from the plaintiff together with cost and interest.

[11] This judgment must be read together with the judgment of the learned trial judge, to appreciate our reasoning in the proper perspective.

[12] It must be noted that adversarial nature of litigation requires at least three areas to be dealt with in the grounds of judgment if it has been raised by the parties. The first relates to rules of procedure and/or jurisdiction, the second relates to law of evidence and then only the substantive rights of the parties as per the law, contract, etc.

[13] In the instant case, PW1 gave evidence as the main witness to sustain the plaintiff's claim. The probative force of this witness was not dealt with in the judgment. This in our view, compromises the decision making process warranting appellate intervention (see cross-examination of witness PW1 — pp 56 onwards — (Vol 2(A)) part B of appeal record).

PW1

[14] The dispute related to the parties has been summarised by the learned trial judge as follows:

[4] The defendant's complaint was that there was persistent delay in the plaintiff carrying out the works diligently, particularly in respect of the construction of the roof trusses, the works for which were yet to start.

[5] The plaintiff on the other hand refuted the allegation of delay on their part or a failure on their part to carry out the works continuously and diligently. The plaintiff alleged that the delay in the works were occasioned by factors beyond their control

A or doing. Firstly, the plaintiff argued that inclement weather that had contributed to the delay. Over and above that, the plaintiff stated that the defendant persistently delayed interim payments for works done which had adversely affected the plaintiffs cash-flow and had thus disrupted payment to suppliers of material at site and wages to workers. Further, the plaintiff contended that the delay in construction of the
B roof trusses, a major complaint of the defendant, was occasioned by structural changes to the design and material that the defendant had instructed to be done. The plaintiff was asked to change the design and material for the roof trusses as it was found to be structurally unsuitable. According to the plaintiff the change in material and design to the roof trusses took some time to be finalised. The plaintiff further states that it was also instructed to carry our variation works which further
C affected the progress of works.

[15] The unique contractual feature of a construction contract will be that there will be a middleman between the employer and contractor who will be an
D architect or engineer or professional of that standing to say and certify work done or not done, etc. If the contractor intends to dispute the employers' case, it must be supported by professional evidence. It is incumbent upon him to lead evidence through a professional of that standing to have at least some probative force for the court to deal with the issue. The middleman certificate
E is often seen to be conclusive evidence (see *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16; [1974] 1 LNS 153).

[16] In the instant case, the plaintiff's sole witness had only a diploma in agriculture and did not have any qualification related to construction industry.
F In addition, he was only a project manager and not a director or person of such locus to move the court to secure a judgment. The weakness of the plaintiff's case on evidence is captured in paras 24–25 of the memorandum of appeal. To save court's time, we reproduce the submission of the appellant on this issue and it reads as follows:

G

> 19. The Appellant further submit that as per page 55–57 Appellant's Written Submissions, during the trial before, the Respondent had only called PW-1 as Respondent's witness (Halim bin Johar) to give statement on behalf of the Respondent. Further, the Appellant disputed the capacity and the qualifications of the PW-1 to verify the claims made by the Respondent while the Respondents in the
> H Respondent's Written Submission at page 24–25 submitted that Section 118 of the Evidence Act 1950 shows that PW-1 are eligible to give statement on the ground that PW-1 has a wide knowledge of the Contract and directly involved in the implementation of the said Project.
>
> 20. The Appellant also submit and reply that PW-1 is not a *proper person* to verify
> I the Respondent's claim for the reason below:
>
> (i) The capacity of the PW-1 was just only a Project Manager of the company and not a member of the Board of Directors or Shareholders in the company as per admission by the PW-1 during cross examination (Refer to page 75 Common Core Bundle Volume No 2);

(ii) Credentials of PW-1 was disputed where PW-1 did not have any academic qualification in any Construction Course but PW-1 was only qualified in Diploma of Agriculture in Universiti Pertanian Malaysia (Refer to page 76 Common Core Bundle Volume No 2);

(iii) There was no letter of appointment or any resolution of the company to authorise PW-1 to represent the Respondent and this matter has been admitted by PW-1 during the cross examination. PW-1 stated that his appointment has been made orally but there is no supporting evidence to that statement (Refer to page 76 Common Core Bundle Volume No 2);

(iv) PW-1 also admitted during the cross examination that PW-1 has no access and not a person who prepared the Respondent's documents involving the losses of the company (Refer to page 78–79 Common Core Bundle Volume No 2).

21. The Appellant further submit that PW-1 during the cross examination replied that the calculation of the Respondent's claim was made by the PW-1 based on the company's report and QS report but PW-1 has failed to produce the said documentary evidence. There was no other witness called by the Respondent to verify the Respondent's claim except for PW-1 only. (Refer to page 96 Common Core Bundle Volume 2).

[17] In our view, PW1's evidence lacks probative force for the plaintiff's claim to succeed taking into consideration his diploma in agriculture as well as many of the statements by him as well as other documentary evidence on the project which were self-serving (for example, see letter dated 18 February 2013, p 528 C/B (Vol 4) which consists of confession as well as inability to complete with the time frame and also the extended time frame). In such circumstance, it would have been prudent for the learned trial judge to accept the evidence of the defendant's witnesses who consisted of the following professionals and/or person as per contractual term and allowed the counterclaim. It is also supported by contractual certificates. To put it mildly, 'PW1's evidence in law cannot sustain the plaintiff's claim or debunk the defendant's counterclaim'.

[18] In passing, we say that construction jurisprudence and contracts are such that, generally time is essence and extension of time provision may entitle the contractor to get extension but even by such extension, the contractor may not be able to complete, then case laws permits the contractor to be terminated for various grounds inclusive of anticipatory breach. It all depends on the facts and circumstances of the case, whether the grounds must be stated in the notice of termination or the court has to construe all the facts of the case to determine this issue. It will be abhorrent to notion of justice and fair play to allow a party to rely on technical arguments in relation to termination only, when the evidence of dispute is well known to all the parties based, inter alia, communications, minutes, etc (see para 5, letter of termination reproduced earlier and the cc to all parties).

[19] For reasons stated above, we allow the appeal and order judgment be entered for the counterclaim as prayed, namely (i)–(iii) with costs here and below and the plaintiff claim to be dismissed with costs. We will now hear the parties on the issue of costs.

We hereby order so.

Appeal unanimously allowed; respondent's claim dismissed and judgment granted for the counterclaim.

Reported by Ashok Kumar